Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET S. ROWLAND,
PETITIONER

V.

ROBERT E. KINGMAN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MAINE

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QUESTIONS PRESENTED

Petitioner Margaret Rowland is a medical doctor currently required by court order to live in Yarmouth, Maine in order to retain custody of her chidren. She remarried on June 14, 1992. Respondent, her former husband, obtained a court order on August 17, 1992, supplemented by a second order on November 19, 1992, providing that Petitioner will lose custody of her children if she moves to Oregon to live with her new husband.

1. Did the State of Maine deny due process of law to Petitioner by providing for an automatic transfer of custody to Respondent if Petitioner moves to Oregon, without any hearing or showing that such a transfer will be in the best interests of the children at the time of the transfer?

2. Did the State of Maine, acting *ex parte* on August 27, 1992, deny due process to Petitioner when it held her in contempt *in absentia* and summarily awarded exclusive custody to Respondent, on his *ex parte* application, without notice or hearing, after Doctor Rowland -- upon advice of counsel -- left to join her new husband in their new home in Oregon, resulting in summary seizure of the

children by police on a "writ of assistance" obtained *ex parte* in Oregon later the same day by Respondent?

3. Did the State of Maine deny Petitioner's constitutional rights of travel, marriage and familial privacy by restricting custody of her children to the village of Yarmouth, Maine, thereby forcing her to choose between residing with her new husband in Oregon without custody of her children or retaining custody of her children by continuing to reside in Yarmouth, Maine?

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CASE BELOW

The decision and opinion below are reported at *Rowland v. Kingman*, 629 A.2d 613 (Me. 1993) and appear in Part I of the Appendix. A-31.

JURISDICTIONAL STATEMENT

The decision by the Court below was rendered on August 11, 1993; rehearing was denied September 9, 1993. A-53. This Petition is therefore timely within 90 days of the latter date, 28 U.S.C. § 2101; Sup. Ct. Rule 204. Jurisdiction in this Court rests upon 28 U.S.C. § 1257(3), since certiorari is being sought on the grounds that Petitioner's rights and privileges under the Constitution of the United States have been denied.

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are as follows:

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

For over a decade, Petitioner Margaret Rowland, M.D., has been a practicing family physician in Yarmouth, Maine. She and Respondent Kingman divorced in May 1991, after two children, Eddie and Meagan, and thirteen years of marriage. The children's "primary residence" was awarded to Petitioner; Respondent was awarded "reasonable visitation." There was no geographic restriction in the custody award. A-54.

In June of 1992 Doctor Rowland and Arthur LaFrance, a Professor of Law in Portland, Oregon, were married. In March of that year, Respondent Kingman filed a motion to have custody taken from Doctor Rowland upon learn-

ing of her marriage plans and the possibility that she might relocate to Oregon with the children if Professor LaFrance were unable to find suitable employment in Maine. In May, Professor LaFrance terminated his unsuccessful two-year job search. He and Doctor Rowland jointly purchased a home in Lake Oswego, Oregon, a Portland suburb, and she both secured employment as a family physician in the Portland area and started the process of terminating her medical practice of 12 years in Yarmouth, Maine. A-7, 23.

On August 17, 1992, Superior Court Judge Beaudoin entered an order denying Mr. Kingman's application to revoke Petitioner's custody. Judge Beaudoin also ordered, however, that

if Doctor Rowland moved to Oregon and Respondent then moved to Yarmouth from his farm house in Winslow, Maine, over fifty miles away, Respondent would get custody. Otherwise, custody remained with Petitioner. A-90.

Petitioner testified she would not move without her children. Upon advice of counsel, since Respondent Kingman neither had a residence in Yarmouth nor had indicated any plans to move there, Doctor Rowland moved, with the children, to her home and husband, and family practice in Oregon, on August 24, 1992. A-7, 103. In making this move, Doctor Rowland recognized, if Respondent Kingman subsequently relocated to Yarmouth, that she might have to return with the

children to Maine. Mr. Kingman, however, never notified Doctor Rowland of a move to Yarmouth. A-103.

Respondent applied on August 27 for an *ex parte* order of contempt, A-94, with the statement that Doctor Rowland would "further abscond" with the children and go into hiding if she or her attorneys were notified. This was done despite the fact that Professor LaFrance had called Respondent on August 25, told him where the children were, and invited him to call or visit. An order was issued on that day by Judge Cleaves of the Maine Superior Court, which held Doctor Rowland in contempt *in absentia*, summarily awarded sole custody and sole parental rights and responsibilities to Mr.

Kingman, ordered Doctor Rowland to deliver the children immediately to Mr. Kingman, and required that Doctor Rowland pay for all related expenses and attorney's fees. A-94. There was no hearing. No notice was given to Doctor Rowland or her attorneys, before or after the entry of Judge Cleaves' Order. Doctor Rowland was given no chance to return with the children to Maine.

Respondent flew to Oregon City, Oregon that same day with Judge Cleaves' order. At 4:30 p.m., Judge Sams of the Circuit Court there issued, *ex parte*, without notice, hearing or a chance to comply, a "Writ of Assistance" authorizing the use of "any force necessary" to seize the

children and to turn them directly over to Respondent. A-121. At 6:30 p.m., still on that same day, four police officers entered Doctor Rowland's home and forcibly seized the children, in tears and bathing suits. The children, without preparation or explanation, were immediately turned over to Respondent Kingman who flew with them through the night, through Seattle and Chicago, back to Maine. A-127.

Doctor Rowland was not notified of the location of her children and, despite help from friends and neighbors in Yarmouth, was unable to locate them for the next three days. Respondent knew that being with their mother and stepfather posed no risk to the

children. A-103. He knew of the excellent nature of the home, neighborhood and schools in Lake Oswego having just heard the testimony before Judge Beaudoin. He had been informed of the location and phone number of his children. *Id.* He knew that Professor LaFrance and Doctor Rowland, employed with a home in Oregon, and the children enrolled in school, would not "further abscond" with the children. He knew, also, that the start of school was two weeks away, leaving ample time for Doctor Rowland to comply with any order requiring that she and the children return to Maine. Importantly, on August 27, Mr. Kingman had not moved to Yarmouth, as the August 17 order required.

Doctor Rowland returned to Maine to try to find her children. Upon her arrival in Yarmouth, Doctor Rowland, with the help of her pastor, Reverend Ken Baily, found the children living with their father in a small apartment located over a garage on Main Street in Yarmouth's commercial district. This apartment, located approximately two miles from Petitioner's home, had not, at that point, ever been scrutinized by the court in terms of its suitabiality for the children.

Further proceedings took place before Judge Beaudoin in Maine. On November 19, 1992, after a contested hearing, he *again* returned custody to Doctor Rowland. This time, he ordered that if Doctor Rowland moves from Yar-

mouth, custody is to be transferred *immediately* to Respondent. A-132. The November order does not require a hearing to determine the best interests of the children at the time of taking custody from Petitioner.

Doctor Rowland testified throughout these proceedings that she would not move to Oregon if to do so meant losing custody of her children. A-7, 59. She offered Respondent Kingman an alternative visitation proposal that would afford him the same number of days with his children that he had currently enjoyed -- configured into longer blocks of time, on a less frequent basis. Doctor Rowland offered to pay for four round trip plane tickets for each child between Oregon and

Maine each year and offered to facilitate Respondent's visits to Oregon to see his children whenever he wished to do so. Petitioner's proposed relocation was not prompted by any desire to interfere with Respondent's relationship with the children.

It was at the later hearings that Judge Beadoin stated that what he had meant by his August 17 Order was that if Doctor Rowland were to relocate to Oregon, she should *first* turn the children over to their father in Winslow, *then* move to Oregon and wait to see if Mr. Kingman subsequently moved to Yarmouth with the children. A-132. If he did not move within a reasonable period of time, the children would be sent to live with Doctor Rowland in

Oregon. Earlier, the guardian ad litem had testified that Kingman's home was unacceptable and that both of Petitioner's homes were suitable residences for her family. A-59. Petitioner had testified she would not leave without the children.

In his November 19 ruling, Judge Beaudoin found that Doctor Rowland should have intuited his intent and, therefore, he affirmed Judge Cleaves' *ex parte* contempt order, held that Petitioner had deliberately misled her own attorneys into misadvising her, and ordered Doctor Rowland to pay thousands of dollars in costs and attorney's fees.

Constitutional arguments were presented to Judge Beaudoin, concern-

ing travel, marriage and due process. These were expanded and extensively presented to the Maine Supreme Court. That Court affirmed by a five-to-two vote. Justice Clifford, in dissent, joined by Justice Roberts, wrote (A-50-52):

> The Order results in requiring one of the parents to reside in Yarmouth, a location where, other than to be the primary physical custodian of the children, *neither* parent now wants to reside.
>
> * * *
>
> In my view, to require that a residence be maintained for the children in Yarmouth, when *neither* parent has any other reason to be there, wastes the parents' resources, contradicts common sense, and constitutes an abuse of discretion.

(Emphasis added.)

Petitioner and her children are confined to a single parent home in Yarmouth, over an hour from Respondent, the divorced father, and a continent away from their stepfather in Oregon, who lives alone in a home which awaits them today. The rationale is the "best interests of the children."

ARGUMENT

I. THE MAINE COURTS DENIED DUE PROCESS BY FAILING TO PROVIDE HEARINGS IN THEIR CUSTODY AND CONTEMPT ORDERS

A. The Custody Orders Should Have Required a Hearing Before Custody Could Be Taken from Petitioner and Transferred to Respondent

The Superior Court's November order, A-169, prospectively revokes Doctor Rowland's custody if she moves to her home, marriage and medical practice in Oregon. Her former husband, Respondent Kingman, automatically gets custody without having to show that he is, at that future time, either a fit parent or that he can offer the children a fit home. Despite the geographic restriction on Doctor Rowland, the November Order places no

similar restriction on Respondent. Under the terms of the Order, he may move the children anywhere. The Order does not provide an opportunity for Doctor Rowland to show that her home in Oregon would be (as, indeed, it now is) an excellent nurturing environment for her children. Nor is Respondent required to prove the opposite.

Such a present determination of future rights is either based on presumed facts, or is imposed regardless of facts. Either way, it denies due process. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Bell v. Burson*, 402 U.S. 535 (1971); *Mathews v. Eldridge*, 424 U.S. 319 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Zablocki v. Redhail*, 434

U.S. 374 (1978). It is as though a state were to determine today who should receive a medical license or lose a driver's license five years hence, on facts not now in existence. A hearing at that time is an unavoidable necessity.

Denying a hearing would be appropriate only if Doctor Rowland had no protectable, recognizable legal interest in the custody of her children. Indeed, the Maine Courts seem to feel this was the case, viewing Petitioner in purely instrumentalist terms -- as a person to cook, clean and care for the children, who should be viewed as state wards. But Doctor Rowland's children are *not* state wards. *Cf. DeShaney v. Winnebago County*, 489 U.S.

189 (1989); *Baltimore City D.H.S. v. Bouknight*, 493 U.S. 549 (1988).

Nor is Petitioner an employee or pensioner of the State. She is a parent, with the rights and responsibilities of custody. She has a legitimate expectancy, as a parent and caregiver, that her rights will not be taken away without a hearing. *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *May v. Anderson*, 345 U.S. 528, 534 (1953).

These two aspects of the trial court's custody orders -- denying a hearing on future facts and dismissing Petitioner's interest -- combine to make an erroneous decision on custody

highly likely. Custody decisions require consideration of multiple factors, typically involving twelve or more statutory considerations. See Opinion below, n.3, A-26. Declaring that Doctor Rowland's custody will be terminated if a single factor (Doctor Rowland's move to Oregon) materializes, no matter when, ignores all other considerations, no matter how relevant. The Order of the Court below thus creates a high probability of error. Denying a hearing under such circumstances denies procedural due process. *Goldberg v. Kelly*, 397 U.S. 254 (1969); *Mathews v. Eldridge, supra*; *Stanley v. Illinois, supra*.

Quite apart from such procedural concerns, due process is implicated by

the crushing economic burdens imposed by the trial court. A-7. The Maine Supreme Court itself noted that Doctor Rowland closed her medical practice in order to move to Oregon. A-31. Since Petitioner must now travel between Maine and Oregon, it is not feasible to open a medical practice in either place. The trial court estimated her income at $35,000, less than half what it was before. Instead of one intact home in Oregon, the trial court has imposed upon the parties and children a scheme where Doctor Rowland has to be a single parent in Yarmouth, with a home in Oregon, and Respondent must maintain another home in Winslow, and an apartment in Yarmouth. The cost is additional tens of thousands of dollars.

Even if there had been a finding that the parties could afford this (and there was none), such a needless waste of resources (better set aside for college educations) simply cannot be justified. The failure to make such a finding denies both procedural and substantive due process. The dissenting Justices below observed that "to require that a residence be maintained for the children in Yarmouth, when neither parent has any other reason to reside there, wastes the parents' resources, contradicts common sense, and constitutes an abuse of discretion." A-52.

The substantive due process denial by the custody order involves not only economic interests but also Peti-

tioner's personal liberties of autonomy, marriage and familial privacy and association, developed more fully in Part II of this Petition. These liberties were extensively reviewed and affirmed by this Court in *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791, 2804-2809 (1993). A woman, such as Doctor Rowland, must remain free to choose the best course for herself and her children. This is a right guaranteed by due process of laws. A custody order which may, without hearing, deny these rights and terminate custody, denies due process.

B. The Contempt Orders Should Not Have Been Entered Without Notice, Hearing and an Opportunity to Comply

1. Judge Cleaves' August Order

The language of the August 17 Order provides that after Petitioner moved to Oregon, Respondent Kingman would get custody if he moved to Yarmouth within a reasonable time. A-90. He did not so move or notify Petitioner. A-7, 103. Instead, on August 27 Respondent proceeded ex parte before Judge Cleaves. Petitioner's rights were terminated *in absentia*. Custody and full parental rights and responsibilities were summarily transferred to Respondent. Petitioner was ordered to return the children, but given no chance to comply. A-94. Her children

were simply seized, as though they were automobiles or drugs in a narcotics raid. A-121.

The cases cited earlier stand for the central constitutional proposition that a hearing is of the essence of due process, indeed of civil liberties. No emergency existed to justify such extraordinary process. *Compare*, *Sniadach v. Family Finance*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Respondent knew where the children were and in fact had been invited to call or visit; there was no concern that the children were in danger; there had been ample testimony about the adequacy of the Oregon home; the start of school was two weeks away. A-59, 103. The actions of

Judge Cleaves were thus so superficial, excessive and unnecessary as to deny due process. *See Chrissy v. Mississippi DPW*, 780 F. Supp. 1104, 1126 (S.D. Miss. 1941).

It seems clear that Cleaves' objective was to punish Petitioner by using her children as pawns or hostages. Perhaps this is permissible where the children are wards of the court, *see Baltimore City D.H.S. v. Bouknight*, *supra*, but children should not be forfeited like so much contraband in a drug case. *Cf.*, *Austin v. United States*, ___ U.S. ___, 113 S. Ct. 2801 (1993). Perhaps summary contempt proceedings are appropriate for criminal contempt, but even in criminal cases, there must be evidence, see *Thompson*

v. City of Louisville, 362 U.S. 199 (1960), and an opportunity to comply, *Lambert v. California*, 355 U.S. 225 (1957). Both were denied to Doctor Rowland. Contempt, *ex parte* and *in absentia*, simply denies due process in the context of this case. *See Hicks v. Feiock*, 485 U.S. 624, 632-36 (1988); *In re Green*, 369 U.S. 689 (1962); *In re Oliver*, 333 U.S. 257 (1948).

Federal and state law both provide that the proper course for Respondent -- if he believed Doctor Rowland had improperly moved to Oregon -- was to enforce his Maine judgment there, under the federal Parental Kidnapping Act, 28 U.S.C.A. § 1738A, and the Uniform Child Custody Jurisdiction

Act, enacted in both Maine, 19 M.R.S.A. §§ 801 et seq. and Oregon, ORS §§ 109.700 et seq. Both require reasonable notice and a hearing, both also exclude punitive contempt orders. Petitioner, therefore, had a legitimate expectancy that her rights would be protected under the Constitution, in either Oregon or Maine, as a matter of due process. *See Washington v. Harper*, 494 U.S. 210 (1990); *Vitek v. Jones*, 445 U.S. 480 (1978); *May v. Anderson*, *supra*.

The issuance of the Writ of Assistance in Oregon illustrates why writs of assistance -- nowhere authorized by Oregon statute or court rule -- are attended by the notoriety and opprobrium accorded them through-

out history. A-7, 121. It was precisely such writs which led to the adoption of the Fourth Amendment. *See Boyd v. United States*, 116 U.S. 616, 625 (1886) and *United States v. Buena Vista*, ___ U.S. ___, 113 S. Ct. 1126, n.20 (1993); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266, 286 (1992); *Brower v. County of Inyo*, 489 U.S. 593, 595 (1989); *Illinois v. Krull*, 480 U.S. 340, 362 (1987); *New Jersey v. TLO*, 469 U.S. 325, 335 (1984). By ignoring the Fourth Amendment in Oregon, Respondent completed the denial of due process begun in Maine.

2. Judge Beaudoin's November Order

In November 1992, Judge Cleaves' contempt order was specifically affirmed -- after hearing -- by Judge Beaudoin. A-132. He then added his own. He stated that he had intended, by his earlier August 17 Order, that the children were to be turned over to Respondent Kingman in Winslow, Maine (a home that had been determined to be unfit for the children by the guardian ad litem), prior to any move by Petitioner to Oregon, even though his August Order had provided for a transfer "after" a move. Judge Beaudoin further asserted that Doctor Rowland should have been aware of this. He concluded, therefore, that she had

deliberately withheld information from and misled her attorneys, deceiving them into misadvising her that, under the terms of the August 17 Order, she could relocate to Oregon with the children as long as Respondent Kingman did not reside in Yarmouth. A-151.55.

Common sense is to the contrary. Petitioner did not flee Judge Beaudoin's Order; indeed, she did her best to obey Judge Beaudoin's Order, assuming he meant what he said. Instead, he simply later sought to write an order he had *not* written, prohibiting Petitioner from going, by claiming that is what the order said all along. But Judge Beaudoin is wrong. The plain language of his own order belies his effort at revisionism.

Due process cannot abide such a shell game. It requires that a statute or order give notice and guidance before a person, like Petitioner, may be held in violation. *Lambert v. California, supra.* As this Court said in *Casey, supra,* 112 S. Ct. at 2803, "Liberty finds no refuge in a jurisprudence of doubt." Citizens cannot be put at risk of arbitrary, punitive, and unpredictable applications of vague rules. *Papachristou v. Jacksonville,* 405 U.S. 156 (1972). Changing the rules retroactively denies due process. *Bouie v. Columbia,* 378 U.S. 347 (1964). A representative of the state may not say one thing, later claim he meant another, and impose the cost of his error or misadvice on the

citizen. *Cox v. Louisiana*, 379 U.S. 559 (1965).

Yet that is exactly what Judge Beaudoin did to Petitioner.

C. The Contempt Issues Are Not Moot

The Maine Supreme Court held that it would not review the lower Courts' findings of contempt. In passing, in footnote 3, A-31, the Court simply said that "since the contempt finding has no practical effect, the issue of its propriety is moot. . ."

The contempt findings were -- and remain -- of "practical" significance. They were the basis for a punitive transfer of custody, an invasion of Petitioner's home in Oregon, a seizure of her children and an assessment of

thousands of dollars in costs. Those findings continue to stigmatize Petitioner as a law breaker, acting in defiance of the law. *See Vitek v. Jones, supra; Wisconsin v. Constantineau*, 400 U.S. 433 (1971). They continue to have a profound impact on Petitioner Rowland's life and marriage. A-7. Such proceedings cannot now be deemed moot, otherwise denials of due process would remain "capable of repetition, yet evading review." *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Sosna v. Iowa*, 419 U.S. 393 (1975).

II. THE MAINE COURT ORDERS HAVE IMPERMISSIBLY BURDENED PETITIONER'S CONSTITUTIONAL RIGHTS OF TRAVEL, MARRIAGE, AND FAMILIAL PRIVACY, WITHOUT NEED OR JUSTIFICATION

A. Petitioner's Rights of Marriage, Family and Travel Have Been Denied

Petitioner seeks to travel from Maine to Oregon, to the home, family and life she has created there. The history of this nation was built by those who traveled West for a better life. *See Edwards v. California*, 314 U.S. 160 (1941). And the Constitution protects the fundamental right of travel. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Doctor Rowland has a constitutional right to marry, to create a new family and to enjoy the privacy of that familial association. This Court

has many times emphasized the constitutional status and importance of the family. *See Stanley v. Illinois*, 405 U.S. 645 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Traditionally -- and constitutionally -- family association is effected by the right to marry, itself an independent constitutional right. *Loving v. Virginia*, 388 U.S. 1 (1967). *See also Zablocki v. Redhail, supra.* This Court has also emphasized the primacy of the parent over the state in caring for children within a family. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These rights implicate and rely upon the central right to privacy, also --

and independently -- protected by the Constitution.

In *Planned Parenthood v. Casey*, 112 S. Ct. at 2807, this Court said that "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." The actions and orders of the Maine courts have dismembered Petitioner's family and forced her to choose between her husband and children. In the words of

this Court in *Casey*, "the power of the State" has thus reached "into the heart of the liberty protected by the Due Process Clause." 112 S. Ct. at 2819.

In 80% of divorce cases, custody is awarded to mothers. After a divorce, many women seek to improve their lives. A new family is one context for doing so, emotionally and financially, for themselves and their children. Divorce is an important step in this process; remarriage completes it. *See Boddie v. Connecticut*, 401 U.S. 371 (1971). By restricting Petitioner to one small village in Maine, the Courts below have vastly curtailed Petitioner's opportunity to create and maintain her family.

The choices of women to marry and create families, like the choice of religion or speech or abortion, are constitutionally protected. *See Sherbert v. Verner*, 374 U.S. 398 (1963). Recent state court decisions have recognized the legitimacy of these choices, for both the mothers and their children, and refused to raise barriers in custody cases to interstate marriage and travel. They recognize that the constitutionally protected "family" is not the unit ended by divorce, but the new one, created by Doctor Rowland's second marriage. It is that family which needs protection, nurturing and respect. *See, e.g., Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993); *Osteraas v. Osteraas*,

849 P.2d 948 (Id. 1993); *Dobos v. Dobos*, 431 S.E.2d 861 (N.C. 1993); *Fortin v. Fortin*, 500 N.W.2d 229 (S.D. 1993); *Mize v. Mize*, 621 So 2d 417 (Fla. 1993); *Day v. LeBlanc*, 610 So. 2d 42 (Fla. D.C. App. 1993); *Marriage of Branham*, 617 N.E.2d 1317 (Ill. App. 1993); *In re Marriage of Pribble*, 607 N.E.2d 349 (Ill. App. 1993); *Smith v. Smith*, 615 So. 2d 926 (La. Ct. of App. 1993); *Lane v. Schenck*, 614 A.2d 786 (Vt. 1992); *Hemphill v. Hemphill*, 572 N.Y.S.2d 689 (App. Div. 1991); *Hill v. Hill*, 548 So. 2d 705 (Fla. Spp. 1989); *Zamarippa v. Gesundheit*, 529 N.E.2d 780 (Ill. App. 1988).

The cost of the lower Court's orders is not simply to marriage and

family. It is also to community. Petitioner, her husband and children must now maintain two homes and engage in transcontinental travel between them. A-7, 23. Continuity in the community -- church, service organizations, friendships -- for all of them must suffer. Petitioner cannot maintain her medical practice, because of protracted absences from Maine and Oregon, leading to a loss of her profession, for which she underwent years of training. Her husband and children must bear similar losses, not only within the several communities where they must now live, but also within the more central community which is their family. *Id.*

B. There Is No Need or Justification for Restricting Petitioner To the Village of Yarmouth

1. The Orders Below Do Not Serve the Best Interests of the Children

The best interests of the children have four times been found to be served by custody in Petitioner. Her home in Maine and her home in Oregon are excellent. A-59. Even after the November contempt order, custody remains with Petitioner. Yet Petitioner and her children are prohibited from living as an intact family in Oregon, in their home with Professor LaFrance.

A state may certainly protect the "best interests" of children. Such ends are legitimate, but the means must be constitutionally defensible.

Destruction of a marriage and an intact family do not qualify. As this Court said in *Stanley v. Illinois*, *supra* at 654, "the State registers no gain towards its declared goals when it separates children from the custody of fit parents." In *Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977)*, this Court held that when a city attempted to restrict the right of a family to live together, "this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Stanley* and *Moore* recognized that a state must protect "the private realm of family life which the State

cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The Courts below simply disregarded Petitioner's rights to marry and to create an intact family for herself and her children. She had provided a good home in Yarmouth; she had created an equally good -- indeed, better home -- in Oregon. Judge Beaudoin simply overrode Doctor Rowland's choice and decided to keep the children in Yarmouth. Yet, as the dissents below noted, none of the adults caring for the children want to live in Yarmouth. Each would create a home elsewhere. Thus, Judge Beaudoin has elevated place above person, as though it is in the children's best interests

to disrupt and dislocate the lives of those who love them.

If the State of Maine were truly interested in the best interests of the children, it would provide incentives for parents to assume the burden of custody, not impose additional burdens. To serve as custodial parent, Petitioner must make significant sacrifices. She does so for love. It seems senseless -- indeed, cruel -- to require that she give up, as well, her freedom to marry and create a family for those whom she loves. It is doubly senseless to deprive the children of their new family, forcing them to live in a single-parent home. Far more rational is the policy, reflected in the state cases cited earlier, of

recognizing and protecting the new family, and deferring to the primary caretaker, enabling her to create a new family and home for herself and her children. *See Reynolds v. Reynolds*, 433 S.E.2d 277 (W. Va. 1993); *Lane v. Schenck*, *supra*.

The trial court emphasized that a move would be upsetting to one of the children, Eddie. He would be leaving the excellent home and community created for him by his mother. Yet the home in Oregon chosen by Doctor Rowland is equally excellent, as are the schools and friends who await Eddie there. The trial court seemed to conclude that the mere *fact* of change was harmful. Yet change -- even painful change -- is essential to growth

and opportunity. And, in a constitutional context, some upset *must* be tolerated if the rights to marry and travel are ever to be exercised and these children, like Doctor Rowland, are to be citizens of the nation and not simply a hamlet in Maine.

Perhaps the best evidence that the State is not truly concerned about the best interests of these children lies not in what the Judge said, but what the August and November Orders did. The Orders here did not say that when Doctor Rowland moves to Oregon, there will then be a hearing to determine the children's best interests. Rather, custody will be automatically transferred to Respondent -- regardless of the location or suitability of

his home or who lives with him. And regardless of the guardian's conclusion that Respondent's home in Winslow is unsuitable. A-59. *See also* A-7, 103.

The State, by automatically revoking custody, *in the future*, is simply preferring fathers to mothers and trying to keep children from leaving Maine. This it may not do.

2. Preferring A Visiting Father Over a Remarried, Custodial Mother Is Not Constitutionally Permissible

The rulings of the Courts below make the very exercise of constitutional rights -- the rights to travel and marry -- a basis for revoking custody. A statute in Maine declares that a proposed interstate move is "a

substantial change in circumstances," permitting a request for the courts to review custody. 19 M.R.S.A. § 752(12). The effect is to keep custodial mothers from moving away from divorced fathers. Judge Beaudoin preserved Respondent's schedule of frequent visitation by burdening Petitioner's rights of travel, marriage and family privacy. But this Court has three times held that the rights of biological fathers do not override the rights of custodial parents to familial privacy and association. *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

The Maine Courts ignored the obvious alternative of rearranging visitation for Respondent. *See* A-59, 132. The state appellate court opinions cited in Part II.A., supra, have found that protracted, less frequent, visitation is often preferable to the disruption, confusion and friction of more frequent visitation. *See also D'Onofrio v. D'Onofrio*, 365 A.2d 27 (N.J. 1976), widely cited for this proposition and *Schwartz v. Schwartz*, 812 P.2d 1268 (Nev. 1991); *Williams v. Pitney*, 567 N.E.2d 894 (Mass. 1991); *In re Marriage of Miroballi*, 589 N.E. 2d 565 (Ill. App. 1991); *Long v. Long*, 381 N.W.2d 350 (Wis. 1986). Allowing more stable visitation through longer blocks of time during school vacations

is a standard arrangement. Doctor Rowland offered to facilitate this, and indeed, to fund such an arrangement.

The Maine Courts also ignored the obvious alternative that Respondent could move to Oregon, to be near his children, rather than preventing Doctor Rowland from moving there to be with her husband, home, family and medical practice. No reason appears for preferring a divorced husband over a remarried mother. The Courts below would allow a divorced husband to refuse to exercise his constitutional right to travel and, in the bargain, insist that Petitioner must therefore give up hers. The orders and proceedings below have thus imposed this bur-

den upon Petitioner: before she may exercise her rights to travel, marry, pursue a medical practice, create an intact family for her children, she must get the permission of her former husband, Kingman.

In *Planned Parenthood v. Casey*, *supra*, 112 S. Ct. at 2828-2829, this Court held that a burden on freedom of choice becomes "undue" -- and hence unconstitutional -- when it deters women from exercising constitutionally protected choices. There, it was notifying a husband before seeking an abortion; here, the burden is turning children over to a *former* husband as a barrier to a new marriage. In either instance, the burden deters exercise of the right and denies due process.

Under *Casey's* analysis, Doctor Rowland could be required to respect Respondent's rights to notice and visit, 112 S. Ct. at 2830. But this Court emphasized that marriage is an association of individuals, and "The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses." And whatever recognition *Casey* may accord *present* husbands, surely less deference is due Respondent Kingman, a *former* spouse.

As in *Casey*, the Maine Court orders give Respondent an effective veto over Petitioner's right to choose whether to marry, and her right to create a family for herself, her chil-

dren and her husband. If Respondent had not brought suit, nothing would have happened. He would still have his right of reasonable visitation. He sought more. He sought dominion over his former wife. In *Casey*, 112 S. Ct. at 2831, this Court wrote, "A State may not give to a man the kind of dominion over his wife that parents exercise over their children."

C. Petitioner's Marital Rights Arguments Were Fully Raised Below

The Maine Supreme Court entertained Doctor Rowland's constitutional arguments concerning her marital and privacy rights, but refused to pass upon them. In footnote 1, A-31, the Maine Supreme Court said the constitutional arguments "were not made before

the trial court", and therefore, Petitioner had not preserved them for review. This was never suggested during the oral argument, by the Justices or Respondent's counsel. Respondent Kingman had made no such claim in his Brief. Instead, he extensively challenged the merits of Petitioner's constitutional arguments. Those arguments occupied over 75 pages of her Briefs before the Maine Supreme Court.

These same arguments were submitted to the trial court during the hearings before Judge Beaudoin. Trial brief material during August, motion material during August and September, and memoranda material from September, all raised Petitioner's rights to marry and create a second family, prior

to Judge Beaudoin's November Superior Court Order, which was the basis of the Appeal to the Maine Supreme Court. From the outset, the court and the parties understood that a decision restricting custody would keep Petitioner from moving and exercising her rights to privacy and association in her marriage.

Judge Beaudoin several times demonstrated his understanding that this case involves fundamental issues of marriage, family, privacy and travel. His November Order, A-132, discusses the Vermont case of *Lane v. Schenk*, *supra*, which considered constitutional arguments by a relocating mother. 614 A.2d at 789-90. Judge Beaudoin disclaimed forcing Petitioner to make the

"Sophie's Choice" referred to (and avoided) in *Lane v. Schenck*. Significantly, the November Order specifically acknowledges "a parent's right to move and 'get on with her life ....'" A-132. Thus the trial court was well aware that it was ruling upon fundamental rights of marriage, family and travel; it simply chose to place the children in Yarmouth and award them to whichever parent moved there.

Still, the Maine Supreme Court, in a single footnote, passed over Petitioner's constitutional arguments. The Maine Supreme Court's singular footnote does not constitute an independent or adequate state bar to consideration of this Petition by this Court. *Compare Murdock v. City of*

Memphis, 87 U.S. 590 (1875) and *Fox Film v. Muller*, 296 U.S. 207 (1935), *with McCoy v. Shaw*, 277 U.S. 302 (1928); *Brinkerhoff-Faris Trust v. Hill*, 281 U.S. 673 (1930); *Staub v. Baxley*, 355 U.S. 313 (1938); *Reece v. Georgia*, 350 U.S. 85 (1955); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Michigan v. Long*, 463 U.S. 1032 (1983); and *James v. Kentucky*, 466 U.S. 341 (1984).

CONCLUSION

This is an important case. It concerns the autonomy of women, once awarded custody, to manage their lives without the destructive dominion of lawyers, courts, police and former husbands. It profoundly affects Doctor Rowland and her children, and

their right to live with Professor LaFrance as an intact family in their home in Oregon. It concerns the rights of hundreds, perhaps thousands, of women and children yearly.

Of the many state courts dealing with interstate marriages and families, few have dealt with the constitutional rights assuring marriage, family and travel. *See Jaramillo v. Jaramillo*, 823 P.2d 299 (N. Mex. 1991). It is then perhaps not surprising that the Court below would seek to evade Petitioner's constitutional arguments, preferring instead the unlimited latitude allowed by family law concepts. A constitutional decision by this Court is necessary to provide needed guidance to the States

and protection to citizens who -- like Petitioner and her children -- seek to exercise their constitutional rights to a new family and a better life.

The contempt issues in this case are integral to the marital and privacy issues. The arbitrary use of contempt powers by Judges Cleaves and Beaudoin, did not simply deny Petitioner's right to due process. The *ex parte* abuse of contempt powers, coupled with the mechanism of a Writ of Assistance, deprived this Petitioner of her right and responsibility to marry and to provide an intact family home for her children.

The question thus posed by this Petition is whether a custodial mother may remarry, and enjoy the privacy and

association of her family, for the benefit of herself, her children and her husband? Surely, in a federal union, under a Constitution that protects marriage and family, and the privacy and primacy of such associations, the answer must be yes. It could hardly be otherwise. Of all the civil rights and relationships protected by the Constitution, marriage and family are the most central; quite possibly, the most important.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition have been served by mailing, postage prepaid, first class, to counsel of record in the court below, at the following address, on November ___, 1993.

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